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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DAVID L. WARDLE,

Petitioner,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,

Respondent.

On Petition For Writ Of Certiorari To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public employee who does not transport passengers or engage in "safety-sensitive tasks" can be drug-tested following a motor vehicle accident when the drug-testing admittedly violates the express terms of the employer's drug policy handbook.

2. Whether the lower courts can conclude that a post-critical incident drug test is reasonable under the law when the employer has made a judicial admission that it conducted the test in error.

3. Whether it is unconstitutional for public employees who simply drive a government vehicle from time to time to be subject to Post Critical Incident testing, regardless of the level of damages incurred in the incident and regardless of the type of work being done at the time of the incident.

4. Whether federal courts can approve drug-testing of government employees whose duties are non-safety sensitive by merely deciding that the tasks involve public safety.

PARTIES TO THE PROCEEDINGS

The parties below were petitioner David L. Wardle, an individual (appellant below), and respondent Lexington-Fayette Urban County Government, a governmental entity (appellee below).

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PETITION FOR WRIT OF CERTIORARI

DAVID L. WARDLE, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This dispute involves an admittedly improper drug testing of the Petitioner (a public employee repairman who was oiling door hinges at the time of the incident), administered by the Respondent (a local governmental entity), following a minor single-car accident in a parking garage when Petitioner backed the rear bumper of his work vehicle into an unmarked stationary pole. The action was originally brought before the United States District Court for the Eastern District of Kentucky, and then taken to the United States Court of Appeals for the Sixth Circuit. The constitutional amendment governing the within matter is the Fourth Amendment. All decisions are unreported.

The lower courts erroneously concluded that the governmental entity's testing of the Petitioner was "reasonable" and thus Constitutional, notwithstanding that the employee was not engaged in safety-sensitive tasks and notwithstanding that the test failed to comply with the provisions of the government's written drug policy.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court for the Eastern District of Kentucky is found in 28 U.S.C. § 1331.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Amend. IV; V; XIV; 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner, David L. Wardle [hereinafter ["Wardle"] is a Kentucky resident and a public employee of the Lexington-Fayette Urban County Government [hereinafter "LFUCG"], a local governmental entity. Wardle, a carpenter in the LFUCG's Division of Building Maintenance and Construction, was subject to the LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedure Handbook," [hereinafter "Handbook"]. That Handbook, as acknowledged by the District Court and the LFUCG, is plagued with confusion and unclear requirements that infringe on the rights of LFUCG employees to be free from unlawful searches and seizures under the Fourth, Fifth, and Fourteenth Amendments.

On the afternoon of April 28, 1999, Wardle had completed his task of oiling door hinges and replacing door locks in one of the LFUCG parking garages, filled out his paperwork, and was proceeding to exit his parking spot within the parking garage when the rear bumper of his pick-up truck struck an unmarked pole. Immediately following the incident, Wardle contacted his immediate superior, Mr. James Turpin, and advised that he had bumped into an unmarked pole in the parking structure.

Upon arriving at the parking structure, Mr. Turpin

contacted his Director and was instructed to order Wardle to undergo a drug test pursuant to Subsection XI.F. of the Handbook, entitled Post-Critical Incident Testing (PCI), which states: "[a]ny employee involved in a single vehicle accident with ***property damages of $2,500.00 or more*** ... will be tested for drug use and blood/breath alcohol presence." [Emphasis added]. Significantly, Turpin promptly prepared paperwork wherein he estimated the damage done to the vehicle was ***no more than $500***. Thus, although the LFUCG knew that the damage was below the Handbook's damage threshold, it ignored Wardle's protests that the test did not comply with the Handbook.

A. <u>The District Court's Decision</u>.

Based upon the LFUCG's failure to abide by its own drug-testing policy as stated in its Handbook, Wardle filed suit in the U.S. District Court for the Eastern District of Kentucky, alleging a violation, *inter alia,* of his Fourth Amendment rights to be free from unreasonable searches and seizures, and for an invasion of his right to privacy.

Importantly, the LFUCG unequivocally admitted in its Answer to the Petitioner's Complaint that the drug test was administered outside of the parameters of its own Handbook, including the following salient points [emphasis added]

- The accident caused less than $650 in damage.
- Wardle promptly advised his superior.
- The Handbook limits PCI testing to those involving property damage exceeding $2,500.
- "**[A]*n error was made in requesting Wardle to undergo a test*** when the actual property damage done to the vehicle was less than $2,500."

- "[Wardle] reported ... on or about April 28, 1999 for this drug and alcohol test."
- Wardle was subjected to a drug test.
- "[T]*he LFUCG committed error under its drug and alcohol policy [in testing Wardle*]."

The LFUCG also acknowledged that in the week between taking the sample and obtaining the results therefrom, it obtained formal estimates showing that the damage to the vehicle was only $500 to $650. It therefore knew that the damage done by Wardle did not come close to the minimum level required for PCI drug-testing under the terms of its own policy. Nevertheless, the LFUCG failed to halt the analysis and made no efforts to destroy the results or otherwise protect Wardle's right to privacy. Instead, the LFUCG utilized the improperly obtained test results to suspend Wardle from his position and restrict his activities.

Based upon these unequivocal admissions, Wardle promptly asked for Partial Summary Judgment. While Wardle's Motion was pending, the LFUCG failed to file any dispositive motions until well after the district court's deadline for filing said motions had passed. Over Wardle's objection, the Court ultimately allowed the LFUCG to file an untimely Motion and then granted the LFUCG's Motion in its entirety.

In sustaining Appellee's tardy Motion for Summary Judgment, the District Court committed numerous errors and completely misconstrued long-standing law pertaining to drug-testing of public employees. First, the District Court committed gross error in ignoring the LFUCG's admission that the testing was improper and in finding that "the search of plaintiff was reasonable."

Secondly, the District Court ignored prevailing case law from throughout the country pertaining to the applicability of post-accident drug-testing to public employees. In so doing, the District Court failed to recognize the impact of a stated minimum damage threshold for PCI testing despite clear legal precedent to the contrary that limits testing to only those individuals engaged in safety-sensitive areas, i.e., transporting of passengers or dangerous cargo; it mistakenly held that the LFUCG did not know the level of damage (despite an admission from the LFUCG supervisor who ordered the testing, ***on the date of the accident***, that the damage did not exceed $500); it erroneously determined that the mere driving of a governmental vehicle subjected Wardle to PCI drug-testing even though the test did not comply with the Handbook.

Finally, the District Court inexplicably held that Wardle's mere familiarity with the ***minimum*** threshold of damage set forth in the Handbook resulted in a ***reduced*** expectation of privacy -- even when the damages failed to come close to the minimum threshold contained in the Handbook, thereby denying him any right to damages.

Wardle's request that the District Court modify its July 21, 2000 Opinion and Order was Overruled by the District Court on January 5, 2001.

B. <u>The Sixth Circuit Court of Appeals Decision</u>

1. **The Sixth Circuit erroneously excused the LFUCG from being bound by its admission that it erred in drug-testing Wardle.**

In its Opinion, the Sixth Circuit engaged in a strained analysis of the technical underpinnings of the appeal,

rather than addressing the substantive issues. In fact, the Sixth Circuit refused to address the LFUCG's binding admission that it had improperly drug-tested Wardle, mistakenly stating that "contrary to Wardle's assertion on appeal, LFUCG's 'judicial admission' was not necessarily an admission that the drug test Wardle was forced to take contravened LFUCG's drug testing policy." This conclusion ignores the LFUCG's Answer, which admits, unequivocally, that "the LFUCG committed ***error under its drug and alcohol policy*** [in testing Plaintiff]." [Emphasis added.] Likewise, in the LFUCG's Response to Wardle's Motion for Summary Judgment, the LFUCG stated that "an error was made in the interpretation of the Drug and Alcohol Free Workplace Policy."

2. **The Sixth Circuit ignored evidence that the LFUCG admittedly had knowledge of the damage level at the time of drug testing as well as before the results were returned.**

Although the Sixth Circuit stated that "the District Court would have been required to assume Wardle's view of the facts for the purpose of deciding the government's motion" if the issue of when the LFUCG knew the amount of damages had been brought to the attention of the District Court, it mistakenly held that the LFUCG's admission that the evidence showing the $500 estimate given by the manager on the date of the accident and the subsequent estimates received by the LFUCG prior to receipt of the drug testing results were never presented to the trial court until Wardle's Motion to Alter, Vacate, or Amend. Ironically, the Sixth Circuit opined that evidence of "[e]ither [the Turpin incident report or the other estimates] likely would have made summary judgment inappropriate."

This conclusion was totally erroneous. In actuality, the manager's incident report was placed into evidence before the District Court on the parties' Motions for Summary Judgment, having been addressed in Defendant's Response to Plaintiff's Motion for Summary Judgment filed at the commencement of this litigation. Furthermore, contrary to the Sixth Circuit's ruling, there was no need for the District Court to "search the record" since the LFUCG admitted, in Exhibit 2 to its Response to Motion for Summary Judgment, that the drug-testing field officer knew, on April 28, 1999, ***the day of the accident***, that the damage was no more than $500.00.

Having mistakenly concluded that the estimates of damage had not been presented to the District Court, the Sixth Circuit held that the District Court was "reasonable" in assuming that the LFUCG did not know that the damage was less than the $2,500 threshold prior to mandating that Wardle undergo drug testing.

3. **The Sixth Circuit erroneously concluded that Wardle did not contest the constitutionality of the drug testing policy.**

Next, the Sixth Circuit mistakenly stated that "[Wardle] did not challenge the constitutionality of LFUCG's drug testing policy on the basis that it failed to take into account the nature of his job in his complaint, his summary judgment motion, or his memorandum in opposition to the government's summary judgment motion." This conclusion ignores reality. Wardle argued throughout the course of this action that he was improperly subject to a drug testing policy that did not comport with the Supreme Court mandate as set forth in Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989). In fact, Wardle ***specifically*** addressed the fact that

the LFUCG's drug testing ***policy*** violated the Fourth Amendment, in his original Motion for Summary Judgment and in his Reply in Support of Motion for Summary Judgment. In his Reply, Wardle cited the fact that the policy was unconstitutional and further stated:

> Despite the LFUCG's assertions to the contrary, Wardle is not ***simply*** challenging the constitutionality of the LFUCG's policy, but the "specific procedures used here and the intrusion on privacy they caused." ... ***Notably, Wardle was not a new employee with unknown work habits, but had been employed in his division for several years prior to the incident in question; Wardle did not work in a pervasively regulated industry; Wardle did not perform a job function which implicated national concerns; and, most importantly, the drug test performed on Wardle could not have been a reliable gauge of his on-the-job conduct insofar as the test that was administered could not determine if Wardle was under the influence of an illicit substance at the time the accident occurred.***

Likewise, in his Memorandum in Support of Motion for Summary Judgment, Wardle stated that "[b]y requiring Plaintiff to undergo a drug test in contravention of the specific requirements of Defendant's own policy, Defendant also conducted an unreasonable search and seizure of Plaintiff's person in direct violation of Plaintiff's Fourth Amendment protections because ***there are no 'surpassing safety interests.'*** The ***'officials who decided [Wardle] should be tested did exercise significant discretion -- indeed, departing from the literal language of the substance abuse policy.'"***

4. The Sixth Circuit failed to address the LFUCG's secondary violation of Wardle's Constitutional rights in proceeding after it had full knowledge that there was no basis for conducting the test.

Fourth, the Sixth Circuit's ruling failed to even establish the ***secondary*** invasion of Wardle's privacy which is addressed in Skinner, i.e., the urinalysis, including private medical facts about the public employee, ***subsequent*** to the LFUCG being alerted to the fact that the damage done to the vehicle did not meet the minimum threshold of the LFUCG's drug testing policy.

As explained to the Sixth Circuit, between the time when the LFUCG mandated that Wardle undergo drug testing, on the afternoon of April 28, and the date when the drug testing results were obtained eight days later on May 5, the LFUCG obtained ***four*** separate estimates of damage done to the vehicle, ***all*** of which demonstrated that ***the damage to the vehicle was 75% less than the minimum threshold required*** for a proper PCI test under the terms of the LFUCG drug testing policy.

Disregarding whether the initial drug testing of Wardle was appropriate, there can be little question that the ***urinalysis and the LFUCG's review*** of the results were unreasonable invasions of Wardle's privacy and a violation of the Constitution. Immediately upon "discovering" the total damages, whether on April 28 or during the eight day period, the LFUCG knew of its "error" in requiring Wardle to undergo drug testing outside of the minimum threshold required under its own drug testing policy. Its decision to obtain and utilize the results created a second Constitutional violation for which there is no reasonable explanation.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT ANY PUBLIC EMPLOYEE WHO DRIVES A GOVERNMENT VEHICLE MAY BE SUBJECT TO PCI TESTING.

In sustaining the District Court's grant of Summary Judgment, the Sixth Circuit committed numerous errors and completely misconstrued long-standing law pertaining to the Constitutional drug-testing of public employees. First, given the LFUCG's admissions that the Waardle's drug-testing was improper and that the LFUCG had made an "error" in drug-testing him outside of the parameters of its Handbook, the Sixth Circuit committed gross error in upholding the District Court's conclusion that "the search of plaintiff was reasonable."

Equally as important, however, is the fact that both lower courts ignored prevailing case law from throughout the country pertaining to the applicability of post-accident drug-testing to public employees. In so doing, both failed to recognize the importance of a minimum damage threshold for PCI testing, despite clear legal precedent to the contrary.

Instead, the Sixth Circuit confirmed the district court's erroneous conclusion that the LFUCG's testing of Wardle was constitutional because 1) the LFUCG could not estimate the level of damages (despite the admissions from the LFUCG to the contrary); 2) the mere ***driving*** of a governmental vehicle makes ***any*** public employees automatically subject to PCI drug-testing. As a result of this ruling, PCI drug testing is deemed "reasonable" for every government vehicle accident, regardless of how

minor simply because an employee is driving a government vehicle. Such an outcome ignores clear Fourth Amendment limitations that only permit testing of individuals engaged in safety-sensitive areas.

A. The Lower Courts Committed Gross Error by Failing to Adhere to the Prior Judicial Admissions Contained in the LFUCG's Answer and in Holding That the Drug-Testing of Wardle Was "Reasonable."

Under long-standing case law, a court is bound by the parties' judicial admissions contained in the pleadings filed of record. As stated in Ferguson v. Neighborhood Housing Services of Cleveland, Inc., 780 F.2d 549, 550-51 (6th Cir. 1986)(emphasis added; citations omitted):

> Judicial admissions "eliminate the need for evidence on the subject matter of the admission," ***as admitted facts are no longer at issue***. Once made, the subject matter of the admission should not be reopened in the absence of a showing of exceptional circumstances....."Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.

In the case at bar, the LFUCG made various admissions which should have been binding upon the lower courts in their analysis of Wardle's claims. As set forth hereinabove, the LFUCG admitted, *inter alia*, that Wardle's vehicle accident caused approximately $500 in damage; that PCI Testing is appropriate only where property damage exceeds $2,500; that ***"an error was made***

in requesting Wardle to undergo a test;" and that "*the LFUCG committed error under its drug and alcohol policy [in testing Wardle].*"

Notwithstanding these judicial admissions, the lower courts elected to disregard them in their entirety when evaluating the parties' competing dispositive motions and Wardle's subsequent appeal. Rather than binding the LFUCG to these admissions, both of the lower courts concluded that the test was ***not*** conducted in error because Wardle was a public employee driving a governmental vehicle. Both courts further concluded that the PCI testing damage threshold contained in the LFUCG's Drug Testing Policy did not serve to limit the LFUCG's ability to test public employees who drive government vehicles. The courts also held that express policy limitations contained in the Handbook did not provide public employees with any reasonable expectation of privacy even for incidents that fail to meet the policy's minimum damage threshold.

This total disregard for the LFUCG's prior judicial admissions resulted in a gross misapplication of law by both of the lower courts and denied Wardle's constitutional right to be free from unreasonable searches and invasions of privacy.

B. The Lower Courts' Decisions Conflict with Well-Established Mandate Regarding Drug Testing of Public Employees.

The Fourth Amendment provides that "the right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated." U.S. CONST. Amend. IV. Moreover, "the Amendment guarantees the privacy, dignity, and security

of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." Skinner v. Railway Labor Executives Assen, 489 U.S. 602, 617 (1989).

In Skinner, this Honorable Court made it clear that the protections afforded by the Fourth Amendment against unreasonable searches and seizures apply to drug testing conducted by the government:

> It is not disputed ... that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. ***Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.*** As the Court of Appeals for the Fifth Circuit has stated:
>
> > There are few activities in our society more personal or private than the passing of urine....It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.
>
> Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir.1987).
>
> ***Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have***

> ***concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.***

Skinner, 489 U.S. at 617-618. Skinner also provides that the reasonableness of a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of ***legitimate*** governmental interests." Id. at 619. [Citations omitted; emphasis added.] Skinner ultimately permitted testing due to the "surpassing safety interests" inherent in the underlying train accident drug-testing policy, emphasizing the importance of testing immediately following train accidents. However, under Skinner, it is unquestionable that the seizure itself (the drug test) results in a constitutional violation -- ***unless the government is able to demonstrate a reasonable basis for the drug-testing***. *See also* Arizona v. Evans, 514 U.S. 1 (1995); Treasury Employees v. Von Raab, 489 U.S. 656 (1989).

Likewise, in Rutherford v. City of Albuquerque, 77 F.3d 1258 (10th Cir. 1996), a long-term city bus driver alleged that a drug test administered by the City of Albuquerque constituted an unreasonable search in violation of his Fourth Amendment rights. The court concluded that the testing of the bus driver, which deviated from the City's written policy, was unreasonable and in direct violation of the Fourth Amendment because the "City's interest in ensuring safety ... appears to have been at a fairly low ebb with respect to [plaintiff's] test." Id. at 1262. As explained by the Rutherford court:

> [E]ven a positive test result could have revealed nothing about his work behavior unless it showed that he ***presently*** was under

> the influence of drugs. Although we do not minimize the importance of detecting impaired employees, ***the fact that such tests may show only that the employee was exposed to drugs weeks earlier means that Rutherford's testing would be a uniquely unreliable gauge of his on-the-job conduct.***[]

Id. at 1263. [Footnote omitted; emphasis added.]

More recently, in Chandler v. Miller, Governor of Georgia, *et al.*, 520 U.S. 305 117 S.Ct. 1295, 1303 (1997), it was established that the "special needs" exception to the Fourth Amendment is to be narrowly construed:

> Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.

In the case here under review, it is undisputed that the LFUCG subjected Wardle to a PCI drug test that constituted a search within the purview of the Fourth Amendment as explicated under Skinner. More importantly, it is undisputed that the test failed to comply with the LFUCG's own drug-testing policies. In requiring Wardle to undergo a PCI drug test in contravention of the specific requirements of its own policy, the LFUCG conducted a discretionary (and therefore unreasonable) search and seizure in direct violation of Wardle's Fourth Amendment protections, particularly since there were no "surpassing safety interests." Skinner, *supra*. As explained in Rutherford, *supra*:

> Rutherford maintains, and we agree, that the circumstances surrounding his urinalysis resulted in a substantially more intrusive search than those upheld by the Supreme Court in *Skinner* and *Von Raab*. In both of those cases, the Court observed that ***"the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them . Here, however, the officials who decided Rutherford should be tested ... depart[ed] from the literal language of the substance abuse policy.***

Rutherford, 77 F.3d. at 1261. [Emphasis added; citations omitted.] Since the test at issue herein admittedly failed to pass the necessary test for reasonableness, the Sixth Circuit's decision to the contrary was in clear error.

C. THE LOWER COURTS ERRED IN REFUSING TO LIMIT POST-ACCIDENT DRUG-TESTING TO SITUATIONS INVOLVING "SAFETY-SENSITIVE POSITIONS" AND "SPECIAL GOVERNMENTAL NEED."

In Connelly v. Newman, 753 F.Supp. 293 (N.D.Ca. 1990), the very type of drug-testing at question herein was addressed in an action brought against the Office of Personnel Management ["OPM"] to challenge OPM's drug-testing plan. Under the OPM plan, the employer could drug test its employees on three grounds: (1) random tests of all OPM employees at the investigator level or higher; (2) ***post-accident or unsafe practices testing whenever an injury resulted from an on-duty accident that required immediate hospitalization or caused property damage over $1,000***; or (3) reasonable

suspicion testing. As the Connelly court properly held:

> [P]ost-accident testing under the OPM Plan fails to satisfy constitutional standards for two related reasons. ***First, OPM employees do not pose a sufficient threat to public safety. They merely drive government vehicles on public roads.*** Their mistakes, whether drug-related or otherwise, do not have catastrophic consequences in terms of human loss, property damage, or environmental damage. In this manner, OPM employees are unlike nuclear power plant workers, air traffic controllers, railroad workers, and oil tanker crews. Second, the OPM Plan implicitly recognizes the non-hazardous job responsibilities of its employees by setting an unreasonably low threshold for post-accident testing.

Connelly, 753 F.Supp. at 297 [emphasis added]. In reaching this holding, the court analyzed the specifics of the plan utilized by OPM (one that is substantially the same as that being utilized by the LFUCG herein), in light of Von Raab, 109 S.Ct. at 1390-91 and Skinner, 109 S.Ct. at 1414. It then concluded:

> OPM's interest in determining the cause of accidents and otherwise ensuring the safety of its employees constitutes a "special need" which justifies conducting post-accident testing in the absence of a warrant or probable cause. [Citations omitted.] This Court must therefore balance OPM's interest in post-accident testing and the employees' reasonable expectation of privacy ... ***The OPM employees subject to the urinalysis program at issue here are primarily***

> *civil service office workers. They do not normally perform hazardous duties, although many OPM employees drive government vehicles* in the course of their employment ... Based on these facts, the Court finds that the government has presented only a minimal interest in post-accident testing of OPM employees.

Connelly, 753 F.Supp. at 297. In so holding, the Connelly court distinguished the OPM employees from those in Skinner, since their duties were not "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences," *citing* Skinner at 1419. The Connelly court also recognized that the government's interest in testing railroad employees in Skinner was compelling because of the high threshold for post-accident testing, requiring injury or damage to railway property of at least $50,000.

The Connelly court provides the following excellent discussion of the exact distinction at issue herein:

> The interests supporting the OPM's drug testing plan are weak in comparison to those in Skinner.... OPM [] seeks to subject to urinalysis all employees involved in automobile accidents that result in $1,000 of total property damage. ***The OPM Plan thus applies more broadly and is more intrusive of its employees' expectations of privacy than was true in Skinner, because the $1,000 threshold for testing is so much lower.***
>
> The government argues that the Fourth Amendment merely requires the occurrence of an accident to justify drug testing of OPM

> employees. ***Under this standard, the government could subject an OPM employee to drug testing based solely on a minor automobile collision, even if that collision occurred while the employee's vehicle was parked in the OPM parking lot.*** The Court rejects this view. Government employees are not defenseless in the face of drug testing programs. Instead, the Fourth Amendment requires of post-accident testing that, at a minimum, accidents meet some threshold level of severity (measured in terms of actual personal injury or property damage suffered, or the level of harm at risk) ...

Connelly, 753 F. Supp. at 295-96. As is abundantly clear from the decision in Connelly and as set forth by the Supreme Court in Skinner, a governmental entity is ***required*** to implement a minimum threshold of damage, follow that policy without discretion, and prove that the employee is engaged in hazardous activities and/or transporting passengers in order for a suspicionless post-accident drug-testing to be appropriate.

Significantly, the U.S. Department of Health and Human Service's post-accident drug-testing policy which involved drug-testing of non-hazardous duty employees was held unconstitutional because it failed to meet a minimum damage threshold. As explained in Nat'l Treasury Employees Union v. Sullivan, 787 F.Supp. 255, 257 (D.D.C. 1992):

> [T]he reasonableness of drug testing turns on balancing the government's interest against the individual's privacy expectation. ***The employees at issue here do not carry***

> ***passengers and do not have access to classified information***. Therefore, neither the national security concerns articulated in Skinner nor the passenger safety rationale of [Nat'l Treasury Employees Union v.] Yeutter{, 918 F.2d 968 (D.C.Cir.1990)] is applicable. The government's interest here is the safety risk that an impaired government driver might pose to other drivers on the road. ***While not insubstantial, this is obviously no different than the interest the public and the government have in keeping any potentially impaired driver off the road. If this is a sufficient "special government need" to permit warrantless searches under Von Raab, ... then the federal government could proceed to test any and all drivers on the road.***

This distinction between employees who carry passengers or have access to classified information and those who merely happen to drive vehicles is the critical issue in the case presently before this Honorable Court. Here, Wardle is nothing more than a carpenter engaged in routine repair work, who, on occasion, happens to drive an LFUCG pick-up truck to and from the job sites. He does not carry passengers, and he does not have access to classified information. Nevertheless, the District Court improperly concluded that "the risk to public safety is substantial and real," and that "[i]mpaired drivers of LFUCG vehicles pose a danger to others on the roadways." It then justified testing drivers as a deterrent "from using controlled substances in the first place," even though the testing was done outside of the drug testing parameters established by the LFUCG. Unfortunately, the Sixth Circuit also chose to ignore the Fourth

Amendment legal precedent cited above.

Significantly, before a court can determine that the drug-testing of employees post-accident even ***qualifies*** for suspicionless testing, it must first determine that the subject employee is an employee who "discharge[s] duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Skinner, 489 U.S. at 1419. In the present instance, the lower courts failed to make a finding that the circumstances warranted a special needs exception to the Fourth Amendment protections afforded ***all*** citizens.

Ironically, in reaching their decisions that the testing of Wardle was reasonable, the lower courts misconstrued the holding of Tanks v. Greater Cleveland Regional Transit Auth., 930 F.2d 475, 480 (6th Cir. 1991), stating: "[t]esting drivers after a fault-based accident involving minor property damage and no personal injuries promotes public safety by determining the cause of the accident." District Court Opinion and Order, p. 7. However, both lower courts failed to recognize that the paramount question presented in ***every*** case that has addressed the issue of drug-testing of public employees is whether the individual was engaged in a "safety-sensitive task." That question forms the crucial distinction between Tanks and Skinner, and the facts herein: unlike the public bus-driver in Tanks, and the train operators in Skinner, Wardle is nothing more than a basic carpenter with no responsibility for transporting passengers.

The lower courts incredulously held that the LFUCG's drug-testing of Wardle was not unconstitutional because the LFUCG was unable to estimate the damages prior to requiring Plaintiff to submit to the drug-testing due to the "immediacy" of the event -- notwithstanding the fact that

the LFUCG had already estimated the damages at $500 on the day of the accident prior to the PCI drug test.

Given the importance of protecting an employee's Constitutional rights, any uncertainty as to whether the level of damages incurred satisfies the testing criteria should have been satisfied ***before*** the test was administered ***or*** before the test results were reviewed. Unfortunately, if allowed to stand, the lower courts' decisions will encourage every governmental entity to simply drug test first and get estimates of damage later, pleading "immediacy" or lack of any formal estimate as an excuse for ignoring the clear distinctions set forth in Skinner, *supra*, and its progeny.

As with the plaintiffs in Sullivan, *supra*, the LFUCG's drug-testing of Wardle without first demonstrating that he was engaged in hazardous activities and/or transportation of passengers was improper despite the District Court's Constitutionally-inaccurate statement that broad-based drug-testing is somehow appropriate merely because "[i]mpaired drivers of LFUCG vehicles pose a danger to others on the roadways." District Court Opinion and Order, p. 7. *See* Nat'l Treasury Employees Union v. Watkins, 722 F.Supp. 766, 769 (D.C. Cir. 1989)(random drug-testing of motor vehicle operators in the Department of Energy was improper because "the safety risks involved with the motor vehicle operators carrying out their duties are not greater than the normal risks associated with vehicle use by the general public.")

Accordingly, contrary to the lower courts' conclusory statements and faulty reasoning, there is simply no justification under the law for the LFUCG's testing of Wardle -- particularly since the LFUCG has failed to

articulate any possible basis for declaring that Wardle was engaged in activities that were "fraught with danger." Without a more substantial showing that Wardle's job responsibilities implicate "strong safety interests," the suspicionless post-accident drug-testing was completely improper and contrary to the prevailing case law throughout the country. *See e.g.*, Skinner, 280 U.S.App.D.C. at 270 (safety considerations alone would not justify testing a "driver whose exclusive duties entail driving a mail van...").

Simply put, the Constitutional criteria cannot be disregarded simply because Wardle happened to be driving a government vehicle in a parking garage at the time that the vehicle scratched a pole. The law requires that, before a governmental entity can violate public employees' Constitutional rights, it must demonstrate that their actions pose grave risk to the general public. *See, gen.*, Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990); Skinner, *supra*; Connelly, *supra*; Sullivan, *supra*; Watkins, *supra*. Here, there can be no such showing since the LFUCG has ***admitted*** that the drug testing was unreasonable and improper because it did not comply with the Handbook.

D. The Lower Courts Committed Reversible Error in Concluding That Wardle Could Not Reasonably Rely upon the Express Terms Contained in the Drug-Testing Handbook.

In holding that the LFUCG's drug-testing of Wardle was "reasonable" even in light of the LFUCG's admissions to the contrary, the lower courts further concluded that Wardle had a "diminished [] expectation of privacy," District Court Opinion and Order, p. 7,

merely because he had an elementary understanding of the ***proper*** bases for drug-testing under the Handbook. However, the provisions of the Handbook define, with particularity, Wardle's "reasonable expectation of privacy" -- i.e., that he could "reasonably" expect to be tested ***only*** in accordance with the express terms of the Handbook, and only after an accident occurred wherein the damage exceeded $2,500. Since the LFUCG judicially admitted that the testing of Wardle was not appropriate, it is beyond comprehension that Wardle could have had a "diminished [] expectation of privacy" because he knew of the ***proper*** standard for post-accident drug-testing.

A public employee's knowledge of the employer's drug-testing plan certainly does not equate to a diminished expectation of privacy. As stated in O'Conner v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987), although there is a reduced expectation of privacy for government employees, these individuals do ***not*** forfeit their Fourth Amendment rights "merely because they work for the government instead of a private employer."

In Nat'l Treasury Employees Union v. Yeutter, 733 F.Supp. 403 (D.D.C. 1990), the court held that if an employee caused an accident ***of the severity described in the plan*** [fatality, hospitalization, or $10,000 damage], "coupled by reasonable and ***articulated grounds*** supporting the conclusion that an employee caused the accident ... common sense suggests that they have a diminished expectation of privacy in their physical condition ***following the occurrence of one of the serious events described in the plan.***" Id. at 416 [emphasis added]. On appeal, the court in Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968, 974 (D.C. Cir. 1990), cautioned:

> Skinner's approval of drug testing turned, not on the illegality of drug use, but on the 'separate and far more dangerous wrong' of performing hazardous tasks while drug- or alcohol-impaired. *See*, 109 S.Ct. at 1421. ***Other than the motor vehicle operators previously discussed*** [i.e., those carrying passengers], ***we know of no FNS employees whose jobs bring them within these safety, security, and drug interdiction exceptions.***

Under the Constitution, a governmental employee's expectation of privacy is diminished only by that employee's engaging in safety-sensitive tasks. *See, e.g.*, Skinner, *supra*; American Fed'n of Gov't Employees v. Derwinski, 777 F.Supp. 1493 (N.D.Cal. 1991); Nat'l Treasury Employees Union v. Hallett, 776 F.Supp. 680 (E.D.N.Y. 1991). Where the employee is ***not*** engaged in such safety-sensitive or hazardous tasks, there is simply no diminished expectation of privacy. American Fed'n of Gov't Employees v. Sanders, 926 F.2d 1215 (D.C.Cir. 1991)(random drug-testing of drivers who transport passengers is permissible but not such testing of other drivers); Sullivan, *supra*; Watkins, *supra*; American Fed'n of Gov't Employees v. Thornburgh, 720 F.Supp. 154 (D.Cal. 1989)(Federal Bureau of Prisons plan held invalid because plan was not targeted at employees who perform specific job functions justifying the high level of governmental intrusion).

In the case at bar, the District Court's determination that a carpenter's expectation of privacy was "diminished" because he knew the proper bases upon which a drug test could be performed is grossly in error.

E. THE DISTRICT COURT'S HOLDING THAT AN ADMITTEDLY-IMPROPER DRUG TEST DOES NOT CONSTITUTE AN UNREASONABLE INVASION OF A PUBLIC EMPLOYEE'S RIGHT TO PRIVACY IS CONTRARY TO EXISTING LAW.

In its Opinion and Order, the District Court mistakenly held that because Wardle was not visually observed during the improper drug-testing, the intrusion upon Wardle's privacy interests was "minimal." Such a conclusion ignores clear federal case law that has unanimously held to the contrary. As recently reaffirmed by the Sixth Circuit in Knox County Education Ass'n v. Knox County Board of Education, 158 F.3d 361, 380 (6th Cir. 1998), drug testing implicates the privacy rights of employees on ***several levels***. Citing Skinner, 489 U.S. at 617 ("There are few activities in our society more personal or private than the passing of urine."), the court held:

> ***The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.***" Skinner, 489 U.S. at 616. In fact, the testing is deemed a search precisely ***because*** it implicates concerns about bodily integrity. Skinner, 489 U.S. at 617. Furthermore, "the limitation on an individual's freedom of movement that is necessary to obtain blood, urine, or breath samples" also amounts to a Fourth Amendment violation, if unreasonable. Skinner, 489 U.S. at 618.

In Skinner, this Court made it abundantly clear that ***any*** drug-testing results in an invasion of privacy, stating:

> [I]t suffices to note that any limitation on an

> employee's freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government's testing program. *Cf.* United States v. Place, 462 U.S. 696, 707-709 (1983).

The only remaining question is whether the drug-testing is reasonable under the Fourth Amendment. Given the fact that Wardle was drug tested, that the LFUCG has admitted that the drug test was improper, and that an "error" was made in forcing him to undergo the embarrassment and humiliation associated with having to go through the process of obtaining the urinalysis as well as the revelation to his employer of the subsequent chemical analysis, there is ***no*** question but that the drug test invaded Wardle's privacy regardless of ***how*** the urine was gathered.

The lower courts' holdings that the invasion of Wardle's privacy was "minimal" because of the ***manner*** in which the test results were obtained ignores the clear parameters set forth in Skinner. The Sixth Circuit's refusal to address the subsequent invasion of privacy by the LFUCG in ***obtaining*** the chemical analysis subsequent to a determination that the testing was done illegally, is a further gross error that allows a violation of Wardle's Constitutional rights.

II. A DIVERGENCE EXISTS WITHIN THE FEDERAL CIRCUITS AS TO WHEN DRUG-TESTING OF GOVERNMENT EMPLOYEES IS APPROPRIATE.

The numerous cases cited hereinabove reveal that the

issue surrounding the Constitutional rights of a public employee faced with demands for drug-testing are confusing. This is particularly true when the term "safety sensitive" has not been definitively delineated. As stated in the concurring opinion in Middlebrooks v. Wayne County, 521 N.W.2d 774, 782-83 (Mich S.Ct. 1994)(emphasis added):

> Authority appears divided [among the federal courts] only because of the misleading way this question is framed. Under the great weight of federal authority, ***there is a clear line between suspicionless testing of motor vehicle operators who carry passengers and suspicionless testing of those who do not.*** In [] Skinner, 280 U.S.App. D.C. 262; 885 F.2d 884 (1989), the court agreed that "strong safety interests support the testing of most Department motor vehicle operators, ***who are responsible for ... the transportation of visiting foreign dignitaries and key Department officials and the operation of passenger-laden shuttle buses.***" Id. at 270. It acknowledged, however, that safety considerations alone ***could not justify testing a "driver whose exclusive duties entail driving a mail van..."*** Id.
>
> The importance of this distinction was reiterated in []Yeutter, 287 U.S.App. D.C. 28; 918 F.2d 968 (1990[]). Among the plaintiffs in that case were employees of the Department of Agriculture who primarily chauffeured officials and who drove shuttles only during the lunch hours and sick days of private

> drivers. The court rejected their attempt to distinguish themselves from the plaintiffs in AFGE v. Skinner, *supra*, on the ground that the latter carried many more passengers. Addressing the argument that this result would "open the door to" testing all government employees who drive to work, ***the court noted a bright line between workers who carry passengers and those who do not: It is not obvious to us that the government could show a special need, unrelated to law enforcement, to test drivers who do not carry passengers; nor do most drivers have diminished privacy expectations with respect to drug testing.***" Id. at 32.

Given the weight of case law discrediting the position taken hereinbelow by the District Court and the Sixth Circuit Court of Appeals, the lack of a "bright line" definition as to what constitutes "safety-sensitive" duties has resulted in the lower courts, in the case here under review, declaring that Wardle's position as a carpenter somehow falls within the strict confines of safety-sensitive as originally established under Skinner, *supra*, and Von Raab *supra*. Such a distortion of this Court's precedent is ludicrous. It is therefore imperative that this Honorable Court establish a bright line test for determining when drug-testing of public employees involved in minor vehicle accidents is appropriate so as to clarify the law pertaining to the ability of governmental entities to invade the privacy of employees without proper legal justification and without compliance with the mandates of the governmental entity's express policies and procedures.

CONCLUSION

THEREFORE, Petitioner David L. Wardle respectfully requests of this Court that it GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPECTFULLY SUBMITTED

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APPENDICES

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 01-5154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID L. WARDLE, *Plaintiff-Appellant,* v. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT *Defendant-Appellee.*

On Appeal from the United States District Court for the Eastern District of Kentucky

Before: BOGGS and BATCHELDER, Circuit Judges; and STEEH, District Judge.*

*The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. David Wardle appeals the district court's grant of summary judgment in favor of the Lexington-Fayette Urban County Government ("LFUCG"

or the "government") in his suit charging LFUCG with violating his Fourth, Fifth, and Fourteenth Amendment rights and various state laws. Wardle is an employee of LFUCG and his claims arise out of a drug and alcohol test he was forced to take after he was involved in a minor accident while driving a county vehicle. The district court considered the parties' cross-motions for summary judgment and held that the government's actions did not violate Wardle's constitutional rights; having dismissed Wardle's federal claims, the court declined to exercise jurisdiction over Wardle's state law claims and dismissed those claims without prejudice. Because Wardle failed to raise the arguments he presents to this court before the district court, we affirm the district court's disposition.

I

Wardle is employed by LFUCG as a carpenter in its Division of Building Maintenance and Construction. On April 28, 1999, Wardle backed the LFUCG vehicle he was driving into a pillar. Section XI(F) of LFUCG's "Alcohol and Drug Free Workplace Policy," entitled "Post-Critical Incident Testing (PCI)," requires employees involved in a single vehicle accident involving property damage of $2,500 or more to notify their supervisor immediately and take a drug and alcohol test.

Wardle notified his supervisor, Ben Turpin, who in turn notified his superior, Carolyn Smith, director of the Division of Building Maintenance and Construction. Smith instructed Turpin to have Wardle take a drug test. Wardle argued unsuccessfully that a drug test was not called for, because the damage was sure to be less than $2,500. Both Wardle and Turpin stated in deposition testimony that Turpin expressed to Smith no opinion as to the level of damage and told Wardle that he could not

estimate the amount of damage.

Turpin accompanied Wardle that day to an independent medical facility called an Urgent Treatment Center ("UTC"), where Wardle took a drug and alcohol test. On May 4, 1999, the UTC informed LFUCG that Wardle had tested positive for drugs. Based on that result, LFUCG suspended Wardle for thirty days and ordered him to submit a substance abuse evaluation. However, Susie Taylor, a member of the LFUCG human resources department who oversees the drug testing program, testified that she learned on May 5, 1999 that it had been determined that Wardle's accident had caused less than $2,500 in damage and therefore did not invoke a mandatory drug test. Wardle's suspension was immediately revoked, all record of his positive test was removed from his personnel file, and he was reinstated with back pay.

Wardle filed suit in district court, alleging that the testing violated his Fourth and Fifth Amendment rights as applied to the stated by the Fourteenth Amendment. He also alleged violations of corresponding provisions of the Kentucky Constitution, and he asserted state law claims for breach of contract, breach of an implied covenant of good faith and fair dealing, intentional infliction of emotional distress, fraud, deceit, and misrepresentation. After the government's answer, Wardle moved for partial summary judgment on his Fourth Amendment claim. The government moved for summary judgment on all of Wardle's claims.

In deciding the summary judgment cross-motions before it, the district court addressed Wardle's argument that "requiring him to undergo drug and alcohol testing

when the property damage fell below the threshold set forth in the LFUCG's 'Alcohol and Drug Free Workplace Guidelines and Procedures' constitute[d] an unreasonable search in violation of the Fourth Amendment."[1] It is important to note, however, that Wardle did not contest the LFUCG's assertion that it discovered that the accident had caused less than $2,500 damage *after* it received the positive test result and suspended Wardle.[2] Accordingly, the district court understandably read Wardle's complaint as alleging that LFUCG violated Wardle's

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[1] As noted above, Wardle also alleged violation of his Fifth Amendment right to due process, but he alleged this violation on the basis that he had been deprived of his job duties based on a test that violated his Fourth Amendment rights. Likely for this reason, the district court limited its discussion to whether LFUCG violated Wardle's Fourth Amendment rights, and Wardle limited his brief and argument on appeal in the same way.

[2] Wardle contended for the first time in his post-judgment motion for reconsideration that LFUCG knew immediately that the damage did not meet the threshold amount, but ordered the drug test anyway and failed to halt the analysis. On appeal, Wardle points to an "Incident Investigation Report" that Turpin filled out on the day of the accident, wherein he estimated the amount of damage at $500. He also points to three estimates LFUCG received from different body shops on April 29, estimating the damage at $624.00, $528.05, and $582.43. Importantly, however, Wardle failed to raise this question of fact before the district court before summary judgment was granted.

Constitutional rights by testing him in what it later found out to have been contravention of its drug testing policy.

The court first noted that drug testing required by a government employer is considered a search, that a search must be reasonable to avoid running afoul of the Fourth Amendment, and that a search generally must be based on individual suspicion for it to be reasonable. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618-20 (1989). However, the court went on to note that there is an exception to the individualized suspicion rule, under which a search can be reasonable based upon "special needs" of the government; in evaluating the constitutionality of a search premised on special needs, the district court wrote that it must balance the privacy interest of the plaintiff against the government's interest in the search. *See id.* at 619.

In conducting this balancing, the court first held that Wardle's privacy interest was diminished by the fact that he knew in advance that he could be tested following a single vehicle accident. While it was true that the damage turned out to be below the $2,500 threshold, the court explained that the LFUCG did not know that at the time of the test; it was therefore necessary for LFUCG to test Wardle, both because the Handbook required testing within eight hours and because drugs pass from the system with time. The court finally mentioned that the drug testing was accomplished with a minimum of intrusiveness, as it was done at an independent medical center and Wardle had not alleged that he was observed in any way during the test.

The court held that the burden placed on Wardle's diminished expectation of privacy was outweighed in this

case by LFUCG's interests in protecting public safety by keeping impaired drivers off the road, deterring drug use among employees, and determining the cause of the accident. Therefore, the court held that the testing was reasonable for Fourth Amendment purposes and granted LFUCG's motion for summary judgment on Wardle's constitutional claims. The court then dismissed without prejudice Wardle's state law claims. Wardle filed an unsuccessful motion for reconsideration and then appealed the district court's grant of summary judgment to this court.

On appeal, Wardle argues that the district court erred in two way in granting LFUCG's summary judgment motion. First, Wardle contends that the court ignored a "judicial admission" by LFUCG that Wardle had been tested in contravention of its drug testing policy, thereby making the testing unreasonable *per se*. Second, Wardle argues that the court erred in failing to recognize that, regardless of whether the testing was performed in contravention of LFUCG's policy, the testing violated Wardle's Fourth Amendment right to be free from unreasonable searches. According to Wardle, for a governmental employer's post-accident drug testing to pass constitutional muster, the target employee must be engaged in safety-sensitive activities; Wardle contends that his job is not safety sensitive.

LFUCG's Admission

In its answer to Wardle's complaint, LFUCG admitted that "an error was made in requesting Wardle to undergo a test when the actual property damage done to the vehicle was less than $2,500." Answer at 3. Wardle argues on appeal that "for suspicionless post-accident

drug-testing to be appropriate, the government is *required* to implement a minimum threshold of damage [and to] follow that policy without discretion...." Appellant's Brief at 16. He contends that LFUCG's admission shows that it ordered him tested knowing that the vehicle damage did not meet the drug policy threshold, and that this makes the drug testing Wardle was forced to undergo unreasonable and therefore violative of his Fourth Amendment rights.

There is a strong argument, based on the Supreme Court's decision in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), that if the government knew the damage did not meet the threshold for drug testing set out in its guidelines, the resultant test would violate Wardle's Fourth Amendment rights. In *Skinner*, the Court determined that a government policy requiring drug and alcohol testing after major railroad accidents did not violate the employees' Fourth Amendment rights because the government's interest in the testing outweighed the employees' privacy rights. *See id.* at 618-20. Specifically, the Court noted that testing can be valid "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion...." *Id.* at 624. If it were clear to all involved that the accident did not meet the threshold requirement for drug testing, then Wardle's expectation of privacy would be significantly greater and the governmental interest in testing would be significantly less than if it were unclear whether the accident qualified for the mandatory drug testing.

However, contrary to Wardle's assertion on appeal, LFUCG's "judicial admission" was not necessarily an admission that the drug test Wardle was forced to take contravened LFUCG's drug testing policy. Indeed, it appears that the district court read the admission as meaning that, *at the time of the testing*, LFUCG did not know whether the accident damage met the threshold but it later became clear that it did not. With this apparent understanding, the court held that it was reasonable for LFUCG to require the test and then withdraw its effects as soon as the LFUCG managers found out that the damage did not meet the threshold. Obviously, the distinction comes down to when LFUCG can be credited with knowing that the damage was less than $2,500.

In his complaint, Wardle alleged generally that LFUCG failed to follow its guidelines because he was forced to undergo a drug test and the damage turned out not to meet the $2,500 threshold. In its motion for summary judgment, LFUCG stated that at the time of testing, it did not know whether the damage would turn out to meet the threshold, so it ordered the test. LFUCG explained that it did not find out that the damage did not meet the threshold until *after* it received the results of the test. In his response to LFUCG's motion, Wardle did not contest this statement, and the district court adopted it as an undisputed fact.

In his post-summary judgment motion to vacate, Wardle argued for the first time that LFUCG knew that the damage did not meet the threshold level at the time it ordered the test. On appeal, Wardle argues that LFUCG knew the damage was insufficient on the day of the accident, or at the very least, the day after it ordered the test (*before* the results were received). He cites as evidence

the incident report filled out by Turpin on the day of the accident and the three auto body estimates received by LFUCG the day after the accident.

If Wardle had pointed out this question of fact in his response to the government's motion for summary judgment, then it is clear that the district court would have been required to assume Wardle's view of the facts for the purpose of deciding the government's motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (noting that at the summary judgment stage, evidence and facts must be viewed in the light most favorable to the non-movant). Either of these likely would have made summary judgment inappropriate.

However, a district court is not required to search the record to determine whether genuine issues of material fact exist when the non-moving party has failed to point them out. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) ("The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact."). Instead, when the non-movant has failed to point out a question of fact on an issue, a district court's "reliance on the facts advanced by the movant is proper and sufficient." *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404 (6th Cir. 1992) (in the context of an unopposed summary judgment motion).

It is true that Wardle pointed out this question of fact in his post-judgment "Motion to Alter, Vacate, or Amend." However, motions to alter or amend judgment are properly used to point out clear errors of law, newly discovered evidence, or an intervening change in controlling law, or to prevent manifest injustice. *See*

Gencorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999). Since there is no contention that any of these applies to excuse Wardle's failure to raise timely the question of fact as to when LFUCG knew the value of the vehicle damage, the fact that Wardle raised it in his post-judgment motion for reconsideration does not help him. Accordingly, we find no error in the district court's acceptance of LFUCG's version of the facts and the interpretation of LFUCG's admission that followed therefrom.

Wardle's Challenge to the Constitutionality of LFUCG's Drug Testing Policy

Wardle's central argument on appeal, though stated in different ways throughout his brief, is that LFUCG could not have forced him to take a post-accident drug test without violating his Fourth Amendment rights, no matter what the degree of damage in the accident, because his job does not require him to engage in "safety-sensitive activities involving passengers or hazardous materials." Appellant's Brief at 18. Essentially, Wardle argues that case law supports a legal distinction between employees whose jobs are "fraught with danger" and therefore implicate "strong safety interests,"and those whose jobs do not. *Id.* at 21. According to Wardle's argument, post-accident testing of the former can be reasonable, and thus constitutionally permissible; however, testing of the latter can not be reasonable. Wardle, who professes to be "nothing more than basic carpenter engaged in routine repair work, who simply happens to drive an LFUCG vehicle to and from job sites from time to time," contends that he falls into the category of employees not engaged in safety-sensitive activities. According to Wardle, the district court erred

in failing to recognize both this distinction and its application to this case, and the court therefore erred in its determination that LFUCG's post-accident drug testing of Wardle was reasonable.

Wardle's argument - that post-accident drug testing applied to him is *per se* unreasonable because he is not engaged in safety-sensitive tasks - is best read as a challenge to the constitutionality of LFUCG's policy itself. The problem with this argument is that Wardle never made it before the district court prior to the court's disposition of the case. He did not challenge the constitutionality of LFUCG's drug testing policy on the basis that it failed to take into account the nature of his job in his complaint, his summary judgment motion, or his memorandum in opposition to the government's summary judgment motion. This argument appears for the first time in Wardle's motion to vacate the district court's summary judgment order.

As mentioned above, Wardle argued in his pre-judgment filings only that LFUCG violated his constitutional rights by failing to follow its drug testing policy guidelines. *See, e.g.* Complaint at 3 ("Despite the clear limitation contained in the Post Critical [Incident] Testing provisions of the Handbook, the LFUCG elected to ignore these Fourth Amendment protections and immediately required Wardle to undergo and illegal search...."); Complaint at 5 ("By failing to follow its written procedure for drug testing, the LFUCG willfully and intentionally violated the minimum standards of adequate notice and legal justification of the U.S. Constitution . . . ."); Memorandum in Opposition at 7 ("the PCI test to which the LFUCG subjected [Wardle] is unconstitutional because, *inter alia*, it did not comport

with the guidelines provided by the Handbook"). Indeed, before the district court, Wardle expressly disavowed any argument that the drug testing policy itself was unconstitutional:

> Plaintiff has never seriously argued that the Handbook provisions governing PCI testing are unconstitutional because, in this case, the LFUCG has unequivocally admitted that the test was administered outside of the parameters of its own handbook (and thus, outside of the parameters of the Constitution).

Memorandum in Opposition at 7. It is therefore clear that Wardle did not challenge the constitutionality of LFUCG's drug testing policy before the district court pre-judgment.

This court does not ordinarily address new arguments raised for the first time on appeal. *See Gencorp*, 178 F.3d at 817; *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1072 (6th Cir. 1993) (noting that this court will not normally address issues raised for the first time on appeal). In explaining why, this court has written:

> "Propounding new arguments on appeal in attempting to prompt us to reverse the trial court -- arguments never considered by the trial court -- is not only somewhat devious, it undermines important judicial values....In order to preserve the integrity of the appellate structure, we should not be considered a 'second shot' forum, a forum where secondary, back-up theories may be minted for the first time."

Isaak v. Trumbull S&L Co., 169 F.3d 390, 396 n.3 (6th Cir.

1999) (*quoting Estate of Quirk v. Commissioner of Internal Revenue*, 928 F.2d 751, 758 (6th Cir. 1991)).

Furthermore, just as it did not help Wardle to have challenged LFUCG's version of the facts for the first time in his post-judgment motion to alter, the fact that Wardle challenged the constitutionality of LFUCG's policy in the same motion does not change this analysis. Wardle's motion for reconsideration was pursuant to Federal Rule of Civil Procedure 59(e). "Rule 59(e) motions are aimed at reconsideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (quoting *FDIC v.World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (internal quotations and citations omitted)); *see also Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) ("A district court does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend"); *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1998) ("a party should not be permitted to raise new arguments or legal theories of liability on a motion to alter or amend the judgment under Rule 59(e).

Since Wardle never argued before the district court that LFUCG's drug testing policy was unconstitutional because it failed to take into account the nature of his job, we find no error in the district court's failure to consider this argument and deem it waived on appeal.

III

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of LFUCG.

No. 01-5154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED OCT 07, 2002

DAVID L. WARDLE,
Plaintiff-Appellant,
v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
Defendant-Appellee.

BEFORE: BOGGS and BATCHELDER, Circuit Judges; and STEEH, District Judge.*

*The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/mg
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 99-299

DAVID L. WARDLE

PLAINTIFF

V. **OPINION & ORDER**

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT DEFENDANT

* * * * * * * * * * *

This matter is before the Court upon plaintiff's motion for partial summary judgment [DE #5] and defendant's motion for summary judgment [DE #30]. Having been fully briefed, these matters are ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff David L. Wardle is employed by the Lexington-Fayette Urban County Government ("LFUCG") in the Division of Building Maintenance and Construction. The LFUCG provides Wardle a vehicle to travel to job sites. On April 28, 1999, Wardle backed his LFUCG vehicle into a concrete pillar. According to the LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedures," any employee who is involved in a single vehicle accident involving property damages of

$2500 or more must immediately notify his or her supervisor and undergo a drug and alcohol test within two hours of the incident, but no later than eight hours after the incident. Wardle notified his supervisor, Ben Turpin, and Turpin notified his superior, Carolyn Smith, who advised Turpin to have Wardle tested for drugs and alcohol. Turpin and Smith were unable to estimate the damage to the LFUCG vehicle. Wardle was then tested at an Urgent Treatment Center.

On May 4, 1999, the Urgent Treatment Center notified the LFUCG that Wardle tested positive for drugs. In response to the test results, however, the LFUCG ordered Wardle to submit to a mandatory substance abuse evaluation and suspended him for thirty days. Immediately after Wardle began to serve the suspension, the LFUCG learned that the damage to the vehicle fell below the $2500 threshold. The LFUCG rescinded the suspension and reinstated Wardle, who suffered no loss of compensation or benefits.

On July 30, 1999, Wardle filed this action, alleging that the drug and alcohol testing violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Kentucky Constitution. In addition, Wardle asserts various state law claims.

II. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment on his constitutional claims. Defendant also moves for summary judgment on plaintiff's constitutional claims as well as his state law claims.

Plaintiff objects to defendant's motion for summary

judgment because defendant has failed to respond to plaintiff's interrogatories and request for production of documents and plaintiff cannot properly defend the motion without a response to his discovery request. Plaintiff filed his motion for summary judgment on the same constitutional issues addressed in defendant's motion before the exchange of any discovery. As for plaintiff's state law claims, defendant moves for summary judgment on sovereign immunity grounds rather than the merits of plaintiff's claims. Therefore, plaintiff's objection is not well taken.

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the

nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

B. Constitutional Claims

It is undisputed that drug and alcohol testing required by a government employer is a search protected by the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). The Fourth Amendment does not bar all searches but only unreasonable ones. *Id.* At 619. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). However, exceptions to this general rule "are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.'" *Id.* at 313. (quoting *Skinner*, 489 U.S. at 619). "When such 'special needs'- concerns other than crime detection- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314.

Thus, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624. Accordingly, in evaluating the constitutionality of the testing of plaintiff, this Court must balance plaintiff's privacy interests against the government's interests. *See id.* at 619.

1. Privacy Interests

In assessing plaintiff's privacy interests, this Court must consider both the nature of the privacy interest and the character of the intrusion. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 & 658 (1995).

Plaintiff asserts that requiring him to undergo drug and alcohol testing when the property damage fell below the threshold set forth in the LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedures" constitutes an unreasonable search in violation of the Fourth Amendment. Essentially, plaintiff argues that LFUCG failed to comply with its testing policy and that this failure, per se, establishes a constitutional violation. In support of this argument, plaintiff relies on *Rutherford v. City of Albuquerque*, 77 F.3d 1258 (10th Cir. 1996). The Court disagrees with plaintiff and concludes that requiring plaintiff to undergo testing when the property damage fell below the policy's threshold amount by itself does not constitute a constitutional violation, but goes to the scope of plaintiff's privacy interests and the nature of the intrusion, a conclusion supported by *Rutherford*.

The facts of *Rutherford* are readily distinguishable.

When Rutherford returned to work for the city after a year layoff due to medical problems, he was sent first to the Employee Health Center for a medical examination, including a urinalysis for drugs. The test revealed the presence of marijuana metabolites. *Id.* at 1259. The city invoked two provisions of the city's substance abuse policy as grounds for testing Rutherford: as a prerequisite to obtaining a city operator's permit and as a condition of beginning employment. *Id.* Rutherford maintained that neither ground applied to him. Rutherford had a city operator's license and his time for renewal had not yet arrived and he was not an applicant seeking city employment for the first time. In addition, Rutherford emphasized that he had not been told that he would be tested until he arrived at work. *Id.* at 1261. The Seventh Circuit stressed that Rutherford was given no advance warning of the testing: "Not only did the substance abuse policy on its face fail to alert him , but the city officials who called him in to work also did not tell him that the test would be administered on the day he returned." *Id.* The court stated that "[t]his sort of *unwarned* testing is, we think, the most intrusive possible, contravening all of one's reasonable expectations of privacy," and distinguished two Supreme Court cases upholding the testing of government employees, stating that "[i]n both cases, the employees knew when testing would, or could, occur." *Id.* at 1262 (emphasis added).

Here, the LFUCG's policy notified plaintiff that he could be required to undergo drug and alcohol testing following certain one-vehicle accidents, as evidenced by plaintiff's protests that the damage did not meet the

policy's $2500 threshold.[1] Plaintiff cannot claim that he was unwarned. Plaintiff's knowledge that testing could occur following a one-vehicle accident diminished his expectation of privacy.

The testing of plaintiff without a damage estimate was necessitated by the fact that the policy requires testing within two hours of the incident, but no more than eight hours. As the Supreme Court has noted, "alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible." *Skinner*, 489 U.S. at 623 (internal citations omitted).

Finally, the Court must consider the intrusiveness of the testing. Plaintiff was tested at an Urgent Treatment Center, an independent medical facility. There is no evidence that anyone observed or listened while plaintiff produced a urine sample, nor is there any evidence that the urinalysis was used to look for, or that its results reflected, anything other than the presence or absence of

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[1] *See* Wardle dep. at 10.

A [Turpin] said we would probably have to take a drug test.

Q Okay. What did you say in response to that?

A I said the policy states the damage had to be $2500 before a drug test could be administered. . . .

drugs. Although the Court recognizes that the drug testing impinged upon plaintiff's privacy interests, such intrusion was minimal.

2. Governmental Interests

To justify suspicionless testing, the government's special need for testing must be "substantial-important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement or individualized suspicion." *Chandler*, 520 U.S. at 306. Here, "the risk to public safety is substantial and real." *Id.* at 323. Impaired drivers of LFUCG vehicles pose a danger to others on the roadways. Requiring drivers to undergo drug testing after certain accidents supplies "an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances in the first place." *Skinner*, 489 U.S. at 629. Further, "[t]esting drivers after a fault-based accident involving minor property damage and no personal injuries promotes public safety by determining the cause of the accident." *Tanks v. Greater Cleveland Regional Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991).

In balancing the interests involved in this case, the Court finds that the government's interests in testing outweigh the burden upon individual privacy. Therefore, the search of plaintiff was reasonable and defendant is entitled to summary judgment on plaintiff's constitutional claims.

C. State Law Claims

Because all claims over which this Court has original

jurisdiction will be dismissed, the Court declines to exercise its supplemental jurisdiction over plaintiff's state law claims. Following the principles articulated by the Sixth Circuit in *Hankins v. The Gap, Inc.*, 84 F.3d 797, 802-03 (6th Cir. 1996), the Court finds that its interest of avoiding the unnecessary resolution of state law issues outweighs the interests of judicial economy and the avoidance of multiplicity of litigation.

III. CONCLUSION

Based on the foregoing, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) plaintiff's motion for partial summary judgment [DE #5] is DENIED;

(2) defendant's motion for summary judgment [DE #30] is GRANTED IN PART and DENIED IN PART;

(3) summary judgment on plaintiff's constitutional claims will be entered contemporaneously with this opinion and order in favor of defendant;

(4) plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE; and

(5) the pretrial conference and jury trial scheduled in this case are SET ASIDE.

This 21st day of July, 2000.

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE